IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, Plaintiff, v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant, and PFIZER INC. and PURDUE PHARMA L.P., Defendants-Intervenors.	Civil Action No. 11-1681 Judge Beryl A. Howell

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL RECONSIDERATION OF COURT'S OCTOBER 4, 2013, ORDER AND MEMORANDUM OPINION

In reliance on Federal Rule of Civil Procedure 54(b), plaintiff Public Citizen moved for partial reconsideration of this Court's October 4, 2013, order and memorandum opinion. *See* Doc. 37. Defendant Department of Health and Human Services (HHS) and intervenors Pfizer and Purdue (collectively, defendants) oppose the motion. *See* Docs. 40-42. Defendants' objections are unavailing. To begin with, the standard of review urged by defendants is at odds with Rule 54 and the case law in this Circuit. Moreover, this Court's decision cannot be explained as implicitly considering, or even weighing, Dr. Rodondi's testimony, as the defendants contend. And, contrary to defendants' contention, Public Citizen's summary judgment submissions plainly argued that documents revealing suspected or confirmed unlawful activity cannot be "confidential" under Exemption 4.

ARGUMENT

I. Because Public Citizen Properly Brought Its Motion Under Rule 54(b), the "As Justice Requires" Standard Applies.

Public Citizen brought its motion for reconsideration under Rule 54(b), which recognizes that this Court has "inherent power to reconsider an interlocutory order as justice requires." *Wannall v. Honeywell Int'l, Inc.*, No. 10-351, 2013 WL 1966060, at *4 (D.D.C. May 14, 2013). Pfizer argues that this Court must instead use the standard applicable to reconsideration under Federal Rule of Civil Procedure 59(e) when considering the portion of Public Citizen's motion regarding partial summary judgment for defendants. Doc. 41, Pfizer Response at 2. Pfizer's position is at odds with the Federal Rules of Civil Procedure and numerous cases in this Circuit.

Rule 59(e) applies only to a motion "to alter or amend a judgment." Fed. R. Civ. P. 59(e). It does not apply to "orders." *Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 42, 48 (D.D.C. 2001). This Court's order, which resolved Public Citizen's FOIA claim with respect to some but not all of the records in dispute, did not "direct entry of a final judgment as to one or more, but fewer than all, [of Public Citizen's] claims or parties," or make the specific and express determination required by Rule 54(b) for entry of partial final judgment. Fed. R. Civ. P. 54(b). Accordingly, under Rule 54(b)'s plain language, the order—"however designated"—is interlocutory. *Id.* An interlocutory order "may be revised at any time" before the entry of final judgment. *Id.*; *see also, e.g.*, *Cobell v. Norton*, 355 F. Supp. 2d 531, 539 (D.D.C. 2005) (discussing the difference between a final judgment and an interlocutory order).

There is no basis for treating the partial grant of summary judgment in this case any differently than the Court treats other types of interlocutory orders. The D.C. Circuit and this Court have repeatedly made clear that Rule 54(b) applies to orders of partial dismissal or orders granting partial summary judgment, where those orders do not dispose of all claims. *See Capitol*

Sprinkler Inspection, Inc. v. Guest Servs., Inc., 630 F.3d 217, 226-27 (D.C. Cir. 2011), (upholding a district court's denial of a motion for reconsideration under Rule 54(b) that challenged the court's earlier grant of partial summary judgment and emphasizing that Rule 54(b) "recognizes [the district court's] inherent power to reconsider an interlocutory order 'as justice requires'"); *Stewart v. Panetta*, 826 F. Supp. 2d 176, 178-79 (D.D.C. 2011) (recognizing that an order dismissing claims against some but not all defendants does not constitute a final judgment); *In Def. of Animals v. NIH*, 543 F. Supp. 2d 70, 75 (D.D.C. 2008) (holding that Rule 54(b) "is the appropriate basis under which a party can bring a motion to reconsider dismissed claims when fewer than all claims in an action have been dismissed"); *Lewis v. United States*, 290 F. Supp. 2d 1, 3 (D.D.C. 2003) (stating that "Rule 54(b) applies to interlocutory orders that adjudicate fewer than all the claims in a given case," where parties agreed that the rule applied to reconsideration of an order granting partial dismissal of claims); *Childers v. Slater*, 197 F.R.D. 185, 190 (D.D.C. 2000) (holding that Rule 54(b) applied to a motion for reconsideration of an "order granting partial summary judgment to the defendant" and stating that "[a]n order granting partial summary judgment is interlocutory in nature"); *Citibank (S. Dakota), N.A. v. FDIC*, 857 F. Supp. 976, 981 (D.D.C. 1994) (recognizing that "[a]n order granting partial summary judgment on liability issues is interlocutory in nature" and that "[i]nterlocutory judgments are therefore subject to the complete power of the court rendering them to afford such relief from them as justice requires").

The only case on which Pfizer relies—*Brooks v. District of Columbia*, 841 F. Supp. 2d 253, 256-57 (D.D.C. 2012)—did not hold that Rule 59's standard would apply to the circumstances here. In *Brooks*, the movant itself invoked Rule 59's standard for review as

applied to a partial grant of summary judgment, so the propriety of applying Rule 59(e) was not contested or addressed by the court.

II. HHS's Attempt to Narrow the "As Justice Requires" Standard And Impose a Heightened Requirement for Demonstrating Harm Should Be Rejected.

Unlike Pfizer, HHS agrees that Rule 54(b) applies to Public Citizen's motion for reconsideration in its entirety. HHS errs, however, by urging this Court to adopt a crabbed interpretation of Rule 54(b)'s "as justice requires" standard and to impose a heightened requirement for demonstrating harm.

A. HHS contends that reconsideration is inappropriate because Public Citizen has not demonstrated an "intervening change in law, discovery of new evidence, or clear error of law made by the Court." Doc. 40, HHS Response at 2. However, the case on which HHS relies for its assertion, *Stewart*, 826 F. Supp. 2d 176, does not purport to identify an exclusive list of factors justifying reconsideration. *See id.* (identifying only factors that are "[i]n general" needed for a successful motion for summary reconsideration). In addition, *Stewart*'s non-exhaustive list of factors for consideration does not refer to a "clear error of law," contrary to HHS's assertion. Rather, it states that any clear error—one "not of reasoning but of apprehension"—may support reconsideration. *Id.*; *see also In Def. of Animals*, 543 F. Supp. 2d at 75 (stating that a court may take into account whether it committed "an error in failing to consider controlling law or data" (internal quotation marks omitted)).

In any event, overlooking Dr. Rodondi's declaration—Public Citizen's core evidence on competitive harm—and not addressing a key argument on which Public Citizen might have been entitled to summary judgment would amount to clear errors. Public Citizen does not seek to relitigate arguments or introduce new facts; it seeks only a decision on an argument that it already made and consideration of the facts that it already presented.

B. HHS also argues that Public Citizen must show a "time sensitive need" for records for which the Court denied all parties' motions for summary judgment, and that this need must outweigh the interest in a more fully developed record. HHS Response at 5. Under this standard, HHS contends that Public Citizen has not demonstrated a harm warranting reconsideration. HHS's position is at odds with Rule 54(b)'s flexible standard.

First, this Court may reconsider its earlier decision even without demonstrating that it would be harmed by the Court's denial of the motion to reconsider. To be sure, some cases state that for justice to *require* reconsideration under Rule 54(b), a movant must show that a "legal or at least tangible" harm "would flow from a denial of" the motion. *Cobell*, 355 F. Supp. 2d at 540; *see also, e.g.*, *In Def. of Animals*, 543 F. Supp. 2d at 76. But the Court may in its discretion grant any motion to reconsider, even in the absence of a showing of harm, "if there are other good reasons for doing so." *Cobell*, 355 F. Supp. 2d at 540; *see also In Def. of Animals*, 543 F. Supp. 2d at 76.

Moreover, Public Citizen has demonstrated tangible harm here: FOIA rests on the foundation that the public has a speedy right to know what its government is up to, yet nearly four years after Public Citizen's FOIA request, there is no end in sight to this litigation. And HHS's Office of Inspector General continues to sign corporate integrity agreements with drug companies accused of breaking the law and endangering public health, all the while leaving the public in the dark as to the consequences of those agreements.[1] Although HHS contends that Public Citizen must demonstrate a more specific, time-sensitive need for the records, it errs in its

[1] Just this month, for example, HHS signed a corporate integrity agreement with Johnson & Johnson as part of a $2.2 billion settlement related to allegations of off-label drug promotion and unlawful kickbacks to doctors and nursing home pharmacies. *See* Department of Justice, Press Release, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigation, Nov. 4, 2013, *available at* http://www.justice.gov/opa/pr/2013/November/13-ag-1170.html.

reliance on *Judicial Watch, Inc. v. DHS*, 514 F. Supp. 2d 7 (D.D.C. 2007). *Judicial Watch* dealt with a FOIA requester's motion for a preliminary injunction ordering the government to disclose requested records. *Id.* at 8. A preliminary injunction standard requires a showing of "irreparable injury." The Court held that the plaintiff did not "demonstrate *any* time sensitive need for [the records] that w[ould] be irreparably lost if disclosure d[id] not occur immediately." *Id.* at 10. In contrast, for justice to require reconsideration here, the Court need only conclude that the harm to Public Citizen's interests is tangible, and Public Citizen has met that standard.

III. This Court's Decision Does Not Indicate That It Considered Dr. Rodondi's Testimony.

Public Citizen's motion asked this Court to reconsider its grant of partial summary judgment to the defendants and partial denial of all parties' motions for summary judgment because the Court appeared to overlook Dr. Rodondi's declaration—Public Citizen's core evidence on the issue of competitive harm under Exemption 4. The Court's opinion, although extensive, did not discuss or even cite Dr. Rodondi's declaration, and as Public Citizen explained, that declaration should have precluded summary judgment to the defendants and entitled Public Citizen to summary judgment instead.

A. HHS repeatedly contends that Public Citizen simply disagrees with the "weight" that this Court gave to Dr. Rodondi's declaration, and that such disagreement does not warrant reconsideration. HHS Response at 3, 4. But there is nothing in the Court's opinion suggesting that it weighed Dr. Rodondi's declaration against evidence produced by the defendants, and granted summary judgment to the defendants (or denied summary judgment to all parties) despite that evidence. The opinion makes no reference to Dr. Rodondi's declaration. That absence is presumably why the intervenors resort to asserting that the Court must have *implicitly* considered Dr. Rodondi's declaration. Pfizer Response at 4; Doc. 42, Purdue Response at 2-3.

In any event, it is black letter law "that at the summary judgment stage the judge's function is not . . . to weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Arrington v. United States*, 473 F.3d 329, 333 (D.C. Cir. 2006). Thus, to the extent that the government believes this Court's opinion can be explained only as implicitly "weighing" evidence, HHS effectively concedes that the Court made a clear error of law.

B. HHS contends that Dr. Rodondi's declaration would not have precluded a grant of summary judgment to the defendants in any event because the Court may exercise its "authority to determine whether a FOIA exemption is applicable as a matter of law." HHS Response at 4 n.1; *see also* Purdue Response at 3. Public Citizen agrees that this Court has authority to apply the law to a set of undisputed facts "not susceptible to divergent inferences," *Alyeska Pipeline Serv. Co. v. EPA*, 856 F.2d 309, 314 (D.C. Cir. 1988), but that authority is beside the point here. As the D.C. Circuit emphasized in *Alyeska Pipeline Service Co.*, "FOIA cases are not immune to summary judgment standards." *Id.* at 313. "[I]f material facts are genuinely in issue or, though undisputed, are susceptible to divergent inferences bearing upon an issue critical to disposition of the case, summary judgment is not available." *Id.* Where a court overlooks evidence creating a dispute of material fact that would have precluded summary judgment, it is appropriate to grant a motion for reconsideration. *Cf. Harrison v. Byrd*, 765 F.2d 501, 504 (5th Cir. 1985) (holding that a district court abused its discretion in denying a Rule 60(b) motion based on the fact that the district court—through mistake or inadvertence—overlooked an affidavit filed by the plaintiff that would have precluded entry of summary judgment).

C. HHS emphasizes that this Court has discretion to deny summary judgment to all parties where it concludes that a more developed record would be helpful. *See* HHS Response at

5; *see also* Pfizer Response at 6. Public Citizen agrees that this Court could have exercised its discretion to deny summary judgment to all parties had the Court considered Dr. Rodondi's testimony yet determined that it needed a more fully developed record from defendants before granting summary judgment to Public Citizen. *See* Fed. R. Civ. P. 56(e)(1). *But see* Wright & Miller, 10A Fed. Prac. & Proc. Civ. § 2728 (3d ed.) ("[T]he court's discretion to deny summary judgment when it otherwise appears that the movant has satisfied the Rule 56 burden should be exercised sparingly."). However, because the district court overlooked Dr. Rodondi's declaration, there is no indication that the Court exercised its discretion based on the complete evidentiary record. And it is reasonable to assume that the Court might well exercise its discretion differently in light of Dr. Rodondi's declaration. It is one thing to give the government "an opportunity to properly support" the facts on which it relies where the opposing party presents no evidence on the issue. Fed. R. Civ. P. 56(e)(1). But where Public Citizen has submitted evidence on the issue, the Court could reasonably exercise its discretion to "consider the fact undisputed for purposes of the motion" and grant Public Citizen summary judgment based on the "motion and supporting materials—including the facts considered undisputed." Fed. R. Civ. P. 56(e)(2), (e)(3).

D. Pfizer contends that even if the Court overlooked Dr. Rodondi's declaration, his testimony does not provide a basis for reversing either the district court's grant of summary judgment to defendants or its decision to deny all parties' motions for summary judgment for some records. Pfizer Response at 4-7. Public Citizen will not revisit the inadequacy of defendants' submissions and the reasons warranting summary judgment to Public Citizen based on Dr. Rodondi's declaration. Those points are fully briefed in Public Citizen's motion for

summary judgment and reply. Doc. 26, Pl.'s Mot. for Summ. J. at 20-30; Doc. 34, Pl.'s Reply at 11-17.

IV. Public Citizen Did Not Waive Its Argument on the Confidentiality of Records Revealing Illegal Activity, and the Court Did Not Decide This Argument.

Public Citizen has asked this Court to rule on its argument that documents revealing suspected or confirmed unlawful activity do not, as a matter of law, cause substantial competitive harm, and thus cannot be "confidential" under Exemption 4. HHS contends that Public Citizen's earlier submissions were limited to arguing that reputational harm relating to illegal activity does not qualify as competitive harm. HHS Response at 6-8; *see also* Pfizer Response at 8; Purdue Response at 3. HHS's contention is at odds with Public Citizen's submissions.

Public Citizen's motion for summary judgment argued both that competitive harm must flow from a competitor's "use of proprietary information," and that potentially embarrassing public disclosure of illegal conduct does not constitute competitive harm under Exemption 4. Doc. 26 at 21 (internal quotation marks omitted). Likewise, under the heading "Exemption 4 does not cover records of unlawful activity," Public Citizen's reply stated that "Exemption 4 does not cover harm, *such as* reputational injury, caused by release of records that reveal unlawful conduct." Doc. 34 at 13 (emphasis added). It explained that "Exemption 4's coverage does not protect companies either from public rebuke for such [likely or actual unlawful activity], *or from competitors' use of information about how to break the law*." *Id.* at 14 (emphasis added and internal citation omitted). Thus, under any fair reading of Public Citizen's submissions, its argument was not limited to whether "reputational injury" from disclosure of illegal activity is cognizable under Exemption 4.

HHS also contends that the Court, in any event, addressed Public Citizen's argument in full, and it points for support to a portion of the memorandum opinion describing Public

Citizen's argument broadly. HHS Response at 8 (citing Memo. Op. at 25); *see also* Pfizer Response at 8; Purdue Response at 3. HHS distorts this Court's decision. The sentence on which HHS relies reads in full: "Although the Court finds unpersuasive the plaintiff's argument that any information related to potential wrongdoing categorically falls outside Exemption 4, this does not mean that all of the withheld information submitted pursuant to the [Corporate Integrity Agreements] is automatically commercial." Memo. Op. at 25. In context, the first half of the sentence bears only on whether the records constitute "commercial" information. The title of the section in which that sentence appears—"Scope of 'Commercial' Information"—lends further support to this conclusion, *id.* at 19, as does the fact that the sentence on which HHS relies appears more than thirteen pages before the Court addressed whether the requested records are "confidential."

CONCLUSION

For the foregoing reasons, Public Citizen requests that the Court grant the motion for partial reconsideration and amend its opinion accordingly.

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Respectfully submitted,

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